

Issue: Termination of Employment; Hearing Date: 08/03/04; Decision Issued:
08/04/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 782



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 782

Hearing Date: August 3, 2004
Decision Issued: August 4, 2004

PROCEDURAL ISSUE

Grievant requested as part of her relief that her disability benefits (which ended when she was removed from employment) be restored. A hearing officer has no authority to restore disability benefits.¹ The decision to pay benefits is made by the agency following claim approval from the Virginia Disability and Sickness Program's (VSDP) third-party administrator (see further discussion in Findings of Fact, *infra*).

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Warden Senior

¹ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Four witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from the termination of her employment on April 5, 2004.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for eight years. She was a Counselor at the time of her separation from employment.

The Virginia Sickness and Disability Program (VSDP) provides eligible employees supplemental or replacement income during periods of partial or total disability. VSDP benefits are administered by the Virginia Retirement System in conjunction with UnumProvident, a third party administrator (TPA). The TPA's primary function is to maintain contact with the employee's licensed treating professional to obtain clinical information concerning the disability and to arrange a return-to-work plan. The TPA periodically emails correspondence to the employee's agency to advise the status of the employee's claim. Employees eligible to participate in VSDP have certain responsibilities including contacting the TPA as soon as possible after the disability begins and, maintaining communication with their agency/supervisor while receiving benefits.⁴ It is vital that every absent employee notify his or her supervisor of each absence so that the supervisor and agency management can make necessary adjustments in workload and assure that the agency's mission is accomplished.

The agency's written policy provides that employees should report to work as scheduled and, that unexpected absences including reporting to work late or leaving work early, should be reported to supervisors as promptly as possible.⁵ During the course of her employment, grievant had failed to comply with the above policy. She was counseled, in writing, about her failure to report to work or call her supervisor on each occasion.⁶ During the fall of 2003, grievant's supervisor verbally counseled her about failing to call in on two occasions

² Exhibit 4. Letter from Chief Warden to grievant, March 29, 2004.

³ Exhibit 1. Grievance Form A, filed April 30, 2004.

⁴ p. 22, VSDP Handbook, 2004.

⁵ Exhibit 5. Section 5-10.8, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

⁶ Exhibit 2. Written counseling, December 15, 2000; written counseling July 20, 2001.

(October 22, 2003 and November 5, 2003). In December 2003, grievant's supervisor detected a pattern in grievant's absences reflecting that she was frequently absent before or after scheduled days off. She noted also that grievant was often tardy. Grievant was counseled, in writing, and placed on leave restriction for a period of six months.⁷ Agency policy provides that an employee demonstrating a pattern of absenteeism immediately before, during or after rest days shall be required to submit a physician's certificate for the absence certifying disability.⁸ If an employee on restricted leave is absent for some other reason, she must submit some form of documentation to corroborate the reason for the absence.

During January 2004, grievant was absent on January 6, 7 & 13. On those dates she called her supervisor but she did not provide any documentation to corroborate the reasons for her absences. Grievant last worked on January 23, 2004. The assistant warden and grievant's supervisor had discussed grievant's absenteeism and tardiness since the fall of 2003. The assistant warden scheduled a meeting for January 29, 2004 with grievant and her supervisor to discuss this issue. Grievant called the assistant warden on that date and said she would be absent due to illness. On January 30, 2004, grievant called her supervisor and stated she would be absent until February 12, 2004. Grievant failed to return to work on February 12, 2004 and never contacted her supervisor thereafter to advise of her status or when she would return to work.

By February 20, 2004, grievant had not contacted her supervisor or anyone else at the agency since January 30, 2004. The Warden Senior sent a certified letter to grievant advising her that her continuing absence was a disciplinary offense and that she would be removed from state service if she did not contact the agency by February 26, 2004. Grievant filed a disability claim with the TPA on February 26, 2004.⁹ On that same day, she faxed to the human resources officer a physician's note excusing her from work until March 12, 2004.

On March 18, 2004, grievant met with the Chief Warden and complained about a meeting that had occurred on December 12, 2003 in which grievant claimed that a person from central office was disrespectful to her. The warden asked grievant to write an incident report fully describing what occurred; grievant has never turned in the report requested by the Chief Warden. Grievant said she would return to work after the meeting but failed to do so. A human resources officer repeatedly called grievant's home but there was no answer and no answering machine. During this period of time, grievant was not restricted from driving or making telephone calls. Grievant called the assistant warden on March 24, 2004 and said she would return to work the following day. Grievant did not return to work on March 25, 2004 and did not call her supervisor, the assistant

⁷ Exhibit 2. Memorandum from supervisor to grievant, December 22, 2003.

⁸ Exhibit 6. Section 201-7.0.B.5.j, Institutional Operating Procedure 201, *Reporting Leave*, December 10, 2002.

⁹ Exhibit 7. Letter from TPA to grievant, March 16, 2004.

warden, or anyone else in facility management. During the latter part of March, grievant had a telephone conversation with the TPA and advised it that she would return to work on March 30, 2004. The TPA approved her disability benefits through March 29, 2004, closed her case, and advised the agency.¹⁰

Finally, the Chief Warden mailed a certified letter to grievant advising her that her continued absence from work without prior authorization or a satisfactory reason was a Group III offense.¹¹ He further advised grievant that failure to contact human resources by April 5, 2004 would be taken as a resignation from state service. The certified letter was received on April 1, 2004 and signed for by grievant's fiancé, with whom she had been living for several months. When grievant failed to contact the agency by April 5, 2004, the agency removed her from employment.

Grievant came to the human resources office on April 21, 2004 and stated that she had received the warden's March 29, 2004 letter in early April. The letter had been placed on a stack of unopened mail which grievant did not open until April 19, 2004.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

¹⁰ Exhibit 7. Letter from TPA to grievant and agency, March 29, 2004.

¹¹ Exhibit 4. Letter from Chief Warden to grievant, March 29, 2004.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹²

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹³ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.¹⁴ An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense.

The agency has demonstrated, by a preponderance of evidence, that grievant was absent in excess of three days without proper authorization or satisfactory reason. The first period of unauthorized absence occurred between January 23, 2004 and January 29, 2004. Grievant failed to contact her supervisor or any other management person during this period of time to provide any reason for her absence from work. Grievant has never provided either a physician's certificate or any other documented reason for the absence during this period. The second period of unauthorized absence occurred between February 12, 2004 and February 26, 2004. Again, grievant failed to contact her supervisor or anyone else during this period. She finally contacted human resources on the deadline day only after receiving the warden senior's letter warning her that her employment could be terminated.

¹² § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹³ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁴ Exhibit 5. Section 5-10.17.B.1, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

The third period of unauthorized absence occurred from March 25, 2004 through April 5, 2004. Grievant had advised the assistant warden that she would return to work on March 25, 2004 but failed to do so. She advised the TPA that she would return to work on March 30, 2004 but failed to do so. During this period she never contacted her supervisor or anyone else to report her absence or the reason for her absence. Grievant's continuing absence was particularly egregious because she had told both the agency and the TPA that she would return to work, but then failed to advise anyone that she was not reporting for work.

Grievant knew, or reasonably should have known, the consequences of her failure to keep the agency informed of her status. She had been counseled both verbally and in writing on several occasions since 2000. Her attendance and tardiness had become so poor that the agency had to place her on a Restricted Leave program beginning in December 2003. Grievant understood that, for every absence, she would have to provide a physician's certificate describing the physical or mental limitations precluding her from performing her job duties, or other equivalent documentation for non-illness-related absences. Despite this, grievant was absent three times in January 2004 without providing the required documentation. Then, beginning on January 24, 2004, she stopped coming to work and failed to notify her supervisor of her status. Much later, when she faxed in notes from physicians, the notes failed to comply with policy because they do not contain a description of the physical or mental limitations that precluded grievant from performing her job.¹⁵

The agency gave grievant ample opportunity to provide satisfactory documentation and make contact with her supervisor during this period of over two months of absence.¹⁶ If, despite all the prior counseling and the leave restriction, grievant was somehow unaware that her job was in jeopardy, the warden senior's letter of February 12, 2004 should have been a wakeup call. That letter unambiguously warns grievant that she would be discharged if she did not contact the agency. Grievant obviously understood that letter because she did contact the human resources office (albeit waiting until the deadline date of February 26, 2004) and provided some information. However, thereafter she again failed to contact her supervisor or provide the agency with any satisfactory reason for her continuing absence.

When a second similar warning letter was sent to grievant, she failed to respond to it for three weeks. Grievant avers that the letter was overlooked. However, it is undisputed that grievant received the letter and had control over it beginning on April 1, 2004. At that point, grievant became responsible for the letter and its contents; the agency had done all that it could by assuring that she

¹⁵ Exhibit 6. Section 201-7.0.B.5.k, *Id.*

¹⁶ Most agencies would have terminated grievant's employment after the first unauthorized absence from January 24-29, 2004. This agency was unusually lenient in delaying discharge for another two months.

received the letter. Grievant, by her own admission, would not answer telephone calls from the agency.¹⁷

Grievant is apparently under the mistaken impression that the TPA could authorize her absences. In fact, the TPA has no authority over agency employees. The TPA is a third-party administrator that has a contract with the Virginia Retirement System for the sole purpose of reviewing disability claims and advising the agency whether claims for disability benefits should be paid. The grievant's employer is the agency – not the TPA. Grievant has a duty and obligation to keep her employer informed of her status when absent. Moreover, the agency has promulgated a leave policy with which grievant must comply if she wants to remain employed. In this case, the agency has demonstrated that grievant failed to fulfill her responsibilities and failed to comply with its leave policy.

Grievant included in her written grievance reference to an alleged verbal personal attack during a meeting in December 2003. She asserts that she felt sufficiently embarrassed that she became depressed and was unable to work during the week of December 15-19, 2003. She infers that this depression continued and was the cause of her absence beginning in January until her removal from employment. As referenced above, she did not raise this issue until March 18, 2004 in a meeting with the Chief Warden. He asked her to provide a written account of the incident so that he could investigate; grievant has never provided any further information to the Chief Warden. During this hearing, grievant inferred that the December 12, 2003 meeting was the genesis of her depression.

However, grievant failed to provide any specific testimony as to exactly what was said that was so embarrassing. Grievant also failed to offer any witnesses to corroborate her allegation despite the fact that five other employees were present during the meeting. Without specific information, the hearing officer has no basis to conclude whether anything inappropriate occurred in that meeting. Even if grievant had provided such information, grievant has not presented any medical evidence or testimony of her physicians to show that the meeting was the sole cause, or even a contributing cause, of her depression. Moreover, even if she had provided such evidence, it would not be germane to this hearing. Grievant's recourse with regard to that meeting is the Chief Warden. If grievant had provided sufficient information to the Chief Warden, he could have investigated the matter and taken appropriate action if he determined that anything improper had occurred. The only remedy available from this

¹⁷ In her written grievance, grievant says that she did not receive calls from her employer. In fact, the employer attempted to call grievant but she did not answer her telephone. Moreover, the agency is not obligated to contact grievant; it is incumbent upon grievant to keep the agency advised of her status. Grievant's attempt to shift blame to the agency for her own failure is unpersuasive.

hearing is rescission of grievant's dismissal. For the reasons stated in this decision, there is no basis to rescind the agency's action.

DECISION

The decision of the agency is affirmed.

The grievant's removal from employment effective April 5, 2004 is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party.

The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁸ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁸ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.